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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT RODRIGUEZ,

Defendant and Appellant.

B266740

(Los Angeles County
Super. Ct. No. NA099246)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Albert Rodriguez, Jr., appeals from his convictions of attempted voluntary manslaughter and vandalism, contending that the trial court erred by admitting evidence of his gang affiliation and by imposing a consecutive sentence for the vandalism count instead of staying the sentence under Penal Code section 654. We conclude that the gang evidence was not prejudicial and was relevant to show his motive for the attack, and that the consecutive sentences were proper because the evidence supports a finding of separate intents and objectives for the two offenses. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On the night of May 23, 2014, Albert Rodriguez, Jr., fired several gunshots toward Michael Frye after bouncers moved their brawl outside the Long Beach bar where it began. Rodriguez was charged with the attempted murder of Frye and felony vandalism of a van parked nearby that bore the brunt of Rodriguez's fusillade. The jury convicted Rodriguez of the lesser included offense of attempted voluntary manslaughter as well as the vandalism count. The trial court imposed consecutive sentences.

Frye and his girlfriend, Samantha Gaddis, were at the bar when Rodriguez and his elderly, wheelchair-bound friend Craig Johnson began flirting with Gaddis. Frye asked a bouncer to intervene but he refused because Rodriguez was "a Mongols," an apparent reference to a motorcycle gang. After Johnson grabbed

Gaddis's buttocks, Frye asked Rodriguez to stop what they were doing. Rodriguez punched Frye, but Frye, who was a much smaller man, got the better of him, landing several blows as Rodriguez lay on the ground.

A bouncer broke up the fight and made Frye and Rodriguez leave the bar through separate exits. As Rodriguez wheeled Johnson out of the bar, Frye began shouting at Rodriguez from a gas station across the street, challenging him to renew their fight. Rodriguez shouted, "You got the shitty end of the deal. If you want to go in the alley and finish it, we can handle it." Johnson shouted at Frye, "Shut the fuck up, punk, or I'll shut you up myself." Johnson also shouted at Rodriguez to "shut that punk up, or I'm going to shut him up myself."

Rodriguez then reached into the passenger side of Johnson's green pick-up truck, pulled out a semiautomatic Glock handgun, and pointed it at Frye. Rodriguez quickly emptied the 10-round clip. None of the rounds struck Frye, who was darting around the van to avoid being hit. Several struck the van, while one grazed a nearby house. Although Frye thought the gun was pointed at him, he acknowledged that he did not see what Rodriguez was doing after he began firing. Frye was not armed and did not make any movements that might suggest he was reaching for a gun.

Once the clip was emptied, Rodriguez reloaded and then drove off with Johnson in the green pick-up truck. Frye followed in his own car in order to get the license number of the truck, then relayed that information to Gaddis, who in turn called Long Beach police. A Long Beach police detective went to the address where the green pick-up was registered, found Johnson in the driver's seat, and arrested him.

Rodriguez then went to the police station to exonerate Johnson and admit that he had been the shooter. Once there, he was interviewed by Detective Adrian Garcia. Rodriguez told Garcia that he had been a member of the Mongols motorcycle gang for 28 years but was now "[r]etired." Johnson was also a former Mongols member, and Rodriguez had known him for 30 years. He and Johnson were "very close," and Rodriguez described him as "a mentor, he is a senior, old." Rodriguez had "a world of respect for him," and would "take a bullet for him."

Rodriguez told the detective that the Mongols was formed by Vietnam veterans after the war. Both had "full rocker" Mongols patches, presumably on their jackets. Rodriguez said he would die for the patch. He was "not afraid of dying for his patch . . . [or] of taking a bullet for [Johnson] or any well respected member of this my Mongol Nation."

Rodriguez said that once outside the bar, Frye "was giving my brother a hard time. He was talking shit to a 70-year-old

amputee. Ok?” That got him “very upset” and “beyond upset” because Frye had “disrespected my brother.” After driving away from the shooting scene, Rodriguez stopped to toss his handgun into the ocean.

After the jury heard Frye’s version of events and Rodriguez’s statement to the police, Rodriguez testified. According to Rodriguez, he was wheeling Johnson toward the pick-up truck when Frye began yelling and taunting him from across the street. Frye was cursing and pulled off his shirt. Frye also swore at and made derogatory comments about both Rodriguez’s mother and Johnson. Rodriguez was concerned for his safety and that of Johnson. Frye reached for his belt, and that was “when I shot up the van.” Frye remained behind the van the entire time, but moved back and forth while there. Rodriguez did not intend to shoot Frye, but after emptying the clip and reloading, he told Frye, “There’s more where that came from.” Frye did not seem fazed and Rodriguez decided it was time to leave.

Rodriguez also confirmed that he and Johnson were very close friends and that he would do whatever Johnson asked and would do anything for him.

Cecilia Rojas, who lived nearby, looked out her window after hearing gunshots and saw Rodriguez fire at Frye, who was

hiding behind a parked van.¹ Jesus De La Rivas Lopez also saw part of the incident. He owned the van that Rodriguez shot up, and testified that the van suffered \$1,252 damage from bullets that damaged a seat, blew out a tire, and left several holes in the van's body. Lopez also testified that at one point he received a phone call that made him afraid to testify. However, at the time of trial he had no such fear and was a willing witness.

DISCUSSION

1. *The Limited Gang Evidence Was Properly Admitted*

1.1 Background Facts

Before the trial started, Rodriguez moved to exclude all evidence concerning his membership in the Mongols motorcycle gang, contending it was not relevant because there was nothing to show the incident was gang related.

The trial court denied the motion because it found the evidence went to Rodriguez's motive to protect his fellow former Mongols member, Johnson. However, the trial court said it would give the jury an instruction limiting to the issues of motive and intent its use of the gang evidence, an instruction it later gave. The trial court later denied the prosecution's request that a gang expert provide testimony on the effect of disrespecting an elder Mongol because there were no allegations that the crime

¹ One other witness heard the shooting and heard Rodriguez say, "There is more where that came from."

had been committed to benefit a street gang (Pen. Code, § 186.22), adding that “the gang issues should be very tailored and very limited.”

During Detective Garcia’s testimony, Rodriguez objected that evidence concerning his statement to the police that touched on his membership in the Mongols and his relationship with Johnson was more prejudicial than probative under Evidence Code section 352. The trial court disagreed, finding that the evidence was relevant to show why Rodriguez’s affinity for Johnson might have been the motive for his decision to begin shooting. Rodriguez contends the trial court erred.

1.2 The Gang Evidence Was Not Unduly Prejudicial

Given the inherently prejudicial nature of evidence that a defendant is a gang member, such evidence cannot be offered to show a defendant’s character and is admissible only if it is logically relevant to a material issue in the case, is not more prejudicial than probative under Evidence Code section 352, and is not cumulative. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223 (*Albarran*).) Gang evidence may be relevant to show the defendant’s motive, intent, or some fact concerning the charged offense. However, due to its potentially inflammatory nature, the trial court must carefully scrutinize gang evidence before admitting it. (*Id.* at p. 224.)

Evidence Code section 352 provides the trial court with discretion to exclude even relevant evidence if its probative value is substantially outweighed by the danger that it will unduly prejudice the defendant. We review the trial court's ruling under the abuse of discretion standard. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1035.) The prejudice that section 352 is designed to prevent is not the prejudice that naturally flows from relevant, highly probative evidence. It applies instead to evidence that uniquely tends to evoke an emotional bias against a defendant as an individual and which has little effect on the issues. (*Ibid.*)

Relying primarily on *Albarran*, *supra*, 149 Cal.App.4th 214, Rodriguez contends the Mongols gang evidence had little or no relevance because Frye was not a rival gang member, Frye's actions were directed at Rodriguez, not Johnson, and Rodriguez's motive for shooting at Frye is explained by the beating Frye had administered to Rodriguez just moments before. We disagree.

The defendant in *Albarran* was convicted of attempted murder and other charges after he was identified as one of two men seen firing shots at a house where a family birthday party was underway. The defendant was a gang member and he was also charged with a street gang benefit allegation. (Pen. Code, § 186.22.) After the jury convicted the defendant on all charges, the trial court granted a new trial motion as to the street gang

allegation due to insufficiency of the evidence, but denied the motion as to the underlying charges. Defendant contended that he should have been granted a new trial in total because the gang evidence admitted to support the street gang allegation had no bearing on the case and was therefore prejudicial under Evidence Code section 352.

The *Albarran* court agreed. The prosecution argued that the evidence was relevant on the issue of motive under the theory that the shooting was carried out in order for the defendant to gain respect within his gang. The Court of Appeal held that the motive for the shooting was not apparent from the circumstances of the case because: (1) the shooting occurred at a private birthday party; (2) defendant's gang had no known rivals; and (3) there was no evidence that defendant or his fellow gang members "announced their presence or purpose" at any time, bragged about the incident, or otherwise took credit for it. (*Albarran, supra*, 149 Cal.App.4th at p. 227.)

Unlike in *Albarran*, here there is direct evidence that Rodriguez's and Johnson's affiliation with the Mongols gang was relevant to the issue of motive. We begin with the aftermath of the bar brawl, where Rodriguez and Frye had been separated and Rodriguez was heading with Johnson toward Johnson's truck when Frye began shouting. Contrary to Rodriguez's appellate contentions, there was evidence that Frye aimed some of his

invective at Johnson. The turning point in this incident was Rodriguez's decision to pull out a gun and fire instead of simply driving off. The evidence shows that the explanation for this choice lay directly in the nature of Rodriguez's relationship with Johnson based on their mutual Mongols affiliation.

Rodriguez told Detective Garcia that Johnson was his mentor and that he would take a bullet for Johnson "or any well respected member of this my Mongol nation." Rodriguez also said that Frye had been "giving my brother a hard time," which made him "beyond upset" because Frye had "disrespected my brother." According to Rodriguez, he would do anything Johnson asked of him. Frye testified that Rodriguez started shooting after Johnson yelled at Rodriguez to "shut that punk up, or I'm going to shut him up myself." In short, the evidence suggests that Rodriguez decided to escalate the incident and begin firing at Frye not because of the earlier fight but in direct response to Johnson's order to shut him up, conduct that can be explained by Rodriguez's devotion to his Mongols brothers and his statement that he would do anything his Mongols mentor Johnson asked of him. As a result, the evidence was highly probative.

Rodriguez also cites *People v. Ramirez* (2016) 244 Cal.App.4th 800, 821-822 in order to show how prejudicial the gang evidence was. In that case, the Court of Appeal held that the trial court erred by denying a motion to strike a street

gang benefit allegation because there was insufficient evidence to establish the requisite predicate gang affiliations and activities. The trial court concluded that the extensive gang evidence admitted as a result of the improper street gang allegation had been prejudicial in regard to the underlying charges. (*Ibid.*) *Ramirez* does not mention Evidence Code section 352 at all and appears inapplicable here.

In any event, we conclude the evidence was not prejudicial under Evidence Code section 352. Citing to newspaper accounts and published decisions, Rodriguez contends the Mongols gang is so notorious that prejudice was inevitable just by the mere mention of the gang. However, references to the Mongols were few and far between. Apart from the police interview, there was only a passing reference during the prosecutor's opening statement, testimony that the bouncer would not ask Rodriguez to stop flirting with Gaddis because he was a Mongol, and the van owner's testimony that he once received a phone call that at first made him fearful of testifying. Whatever notoriety the gang might have – a speculative assertion to be sure – we conclude there was no prejudice under Evidence Code section 352 due to the highly probative nature of the motive-related evidence,

combined with the trial court's limiting instruction. (*People v. Montes* (2014) 58 Cal.4th 809, 859-860.)²

Finally, we reject Rodriguez's contention that admission of the gang evidence violated his due process rights under the federal constitution. In order to make out this claim, Rodriguez must meet a high constitutional standard: showing that the erroneously admitted evidence resulted in an unfair trial. (*Albarran, supra*, 149 Cal.App.4th at p. 229.) If permissible inferences can be drawn from the evidence, there is no due process violation. (*Ibid.*) As just discussed, the Mongols-related evidence raises such inferences.

2. *Consecutive Sentences Were Proper*

Penal Code section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The statute generally precludes multiple punishments for a single

² The absence of prejudice can also be seen in the jury's verdict. The jury found Rodriguez not guilty of attempted murder, selecting the lesser included offense of voluntary manslaughter instead. At least one explanation for the jury's verdict was that it concluded Rodriguez had been provoked and acted under the heat of passion because Frye had insulted Johnson. Thus, far from being prejudiced by the gang evidence, Rodriguez may in fact have benefitted from it.

physical act that violates different provisions of law, as well as multiple punishments for an indivisible course of conduct that violates more than one criminal statute. (*People v. Newman* (2015) 238 Cal.App.4th 103, 111-112 (*Newman*).)

Section 654 does not bar multiple punishments in two settings: (1) for an act of violence against multiple victims; and (2) for a single course of conduct where the defendant had multiple criminal objectives that were independent of, not incidental to, each other. (*Newman, supra*, 238 Cal.App.4th at p. 112.) The application of the second exception depends on the defendant's intent and objective. (*Ibid.*)

Rodriguez argues that his consecutive sentence for vandalism violated Penal Code section 654 because, under *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264 (*Kurtenbach*), the multiple victim of violent crimes exception is inapplicable where one of the violent crimes was a property offense such as vandalism. The defendant in *Kurtenbach* was convicted of arson after burning down his own rental property. He was also convicted of vandalism because the fire spread to a neighboring property, and was sentenced consecutively for both offenses. The Court of Appeal held that the consecutive sentence was not proper because the multiple victim exception applied to only crimes against persons, not property. (*Id.* at pp. 1290-1291.)

Respondent contends that the consecutive sentences were proper under the exception for multiple intents and objectives because there was evidence that Rodriguez separately intended to shoot only the van. The parties did not address the section 654 issue below and the trial court did not make an express finding regarding the inapplicability of that statute when it sentenced Rodriguez. As a result, we will affirm the trial court's implied finding so long as it is supported by substantial evidence. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

The closest the trial court came to articulating a reason for imposing consecutive sentences was its statement that "the van sustained the most hits in this particular case." This at least suggests a finding that at some point, the van was Rodriguez's primary target. We conclude that the record contains sufficient evidence to support the implied finding that Rodriguez had multiple objectives as he fired his gun.

Rodriguez testified that Frye was not at the front of the van when he began firing. The first shot struck a tire and most of the damage was inflicted to the front of the van. Rodriguez also testified that he was shooting at the van and did not intend to shoot Frye. Although the jury found that Rodriguez intended to kill Frye, based on this evidence the trial court could also find that Rodriguez first intended to scare Frye by shooting only the van where Frye was standing, but shifted to a new objective –

Frye himself – at some point during the shooting as Frye continued to taunt him.

Rodriguez complains that such a finding would be contrary to the prosecution's theory of the case that his sole intent had been to kill Frye. However, the test on appeal is whether there was substantial evidence to support the trial court's implied finding, not whether that finding is inconsistent with the prosecutor's jury arguments.

DISPOSITION

The judgment is affirmed.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.